

Twenty First Century Oils Sdn Bhd v Bank of Commerce (M) Bhd & Ors (No 1)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D5-24-35-93

ABDUL MALEK J

15 APRIL 1993

Civil Procedure — Contempt of court — Restraining order obtained by applicant — Order for committal for alleged contempt of the order — Application by secured creditor to set aside order — Whether party in contempt could be heard before purging contempt

On 17 February 1993, the applicant, Twenty First Century Oils Sdn Bhd ('Twenty First Century') obtained an order ex parte under the provisions of s 176 of the Companies Act 1965 restraining the creditors of Twenty First Century from taking further actions or proceedings including but not limited to any court action, appointment of receivers and managers and/or taking any action/proceeding whatsoever under any of the security documents signed with or given to the creditors against Twenty First Century and any third party who have given security for and on behalf of Twenty First Century until completion of the composite schemes of arrangement proposed pursuant to s 176(10) of the Companies Act 1965 except by leave of court and subject to such terms as the court may impose. On 3 March 1993, the Bank of Commerce ('BOC') applied by way of summons-in-chambers upon a certificate of urgency to intervene and set aside the order of 17 February 1993. At the hearing of the application of BOC, counsel for Twenty First Century raised a preliminary objection that as Twenty First Century had obtained leave to institute committal proceedings against the officers of the bank, the bank's application to set aside the restraining order of 17 February 1993 should be adjourned until the application to commit for contempt is heard or until the contempt is purged.

Held, dismissing the applicant's preliminary objection:

The rule, that a party in contempt cannot be heard or take proceedings in the same cause until he had purged his contempt, applied only where a writ of attachment had been issued or where an order for committal had been made. It could not apply to an application to set aside an injunction granted ex parte. Therefore, the bank should not be precluded from stating its stand despite the pending committal proceedings.

[Bahasa Malaysia summary]

Pada 17 Februari 1993, pemohon, Twenty First Century Oils Sdn Bhd ('Twenty First Century') telah mendapat suatu perintah ex parte di bawah peruntukan s 176 Akta Syarikat 1965 menghalang pemiutang Twenty First Century daripada mengambil tindakan yang selanjutnya

- A dan prosiding yang termasuk tetapi tidak terhad kepada sebarang tindakan mahkamah, perlantikan penerima dan pengurus dan/atau mengambil sebarang tindakan/prosiding di bawah sebarang dokumen jaminan yang ditandatangani dengan atau diberi kepada pemiutang terhadap Twenty First Century dan sebarang pihak ketiga yang telah memberi jaminan untuk dan bagi pihak Twenty First Century sehingga tamatnya persetujuan skim komposit yang dicadangkan berdasarkan s 176(10) Akta Syarikat 1965 kecuali jika kebenaran mahkamah dan tertakluk kepada terma-terma yang dikenakan oleh mahkamah. Pada 3 Mac 1993, Bank Perdagangan ('BOC itu') telah memohon melalui saman dalam kamar atas suatu perakuan yang terlalu mendesak untuk mencelah dan mengenyahkan perintah pada 17 Februari 1993 itu. Pada pendengaran permohonan BOC, peguambela untuk Twenty First Century telah membangkitkan suatu bantahan awal bahawa oleh kerana Twenty First Century telah mendapat kebenaran untuk memulakan prosiding komital terhadap pegawai bank itu, permohonan bank itu untuk mengenyahkan perintah penyekatan pada 17 Februari 1993 itu sepatutnya ditangguh sehingga permohonan untuk menghukum kerana menghina mahkamah itu didengar atau sehingga penghinaan itu dibersihkan.
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Diputuskan, menolak bantahan awal pemohon itu:

- E Rukun, bahawa suatu pihak yang menghina mahkamah tidak boleh didengar atau mengambil prosiding dalam kausa yang sama sehingga beliau membersihkan penghinaan itu, hanya boleh diguna di mana suatu writ penahanan telah diisu atau di mana suatu perintah komital dibuat. Ia tidak terpakai kepada suatu permohonan untuk mengenyahkan suatu injuksi yang telah diberi ex parte. Oleh itu,
- F bank itu tidak boleh dikecualikan daripada menyatakan pendirian mereka walaupun prosiding komital belum selesai.]

Cases referred to

- G 1 *Instituto Bancario San Paolo Di Torino Spa v Colour Touch Sdn Bhd & Anor* (Kuala Lumpur High Court Civil Suit No D5-22-1410-92) (unreported) (folld)
- 2 *Hadkinson v Hadkinson* [1952] P 285; [1952] 2 All ER 567 (distd)
- 3 *Avery v Andrews* (1882) 51 LJ Ch 414 (refd)

- H *Paul Ong and Harinder Kaur Veriah (Paul Ong & Associates)* for the applicant.

N Chandran and Pushpa Menon (Adnan Sundra & Low) for the intended intervenor/applicant.

Abdul Malek J: The applicant had by an originating summons filed on 12 February 1993 applied for the following orders ex parte:

- I (a) that the applicant may be at liberty to convene separate meetings of its classes of creditors, and be at liberty to convene a meeting of its shareholders for the purpose of considering and if thought fit approving

- with or without modification the composite schemes of arrangement proposed to be made between the applicant and its creditors as defined in the composite schemes of arrangement pursuant to s 176 of the Companies Act 1965 ('the Court Meetings'); A
- (b) that the directions may be given as to the time, date and place of the court meetings and to the method of convening the applicant's court meetings; B
- (c) that Mr Gan Ah Tee failing him Mr Ooi Woon Chee both of Peat Marwick Consultants Sdn Bhd may be appointed as chairman and the said chairman be directed to report the results thereof to this honourable court;
- (d) that the plaintiff or plaintiffs to the actions or proceedings against the applicant more specifically set out in exh A-7 annexed to the affidavit herein and annexed to the originating summons and all and/or any of the creditors of the applicant be restrained whether by themselves, their servants or agents or otherwise, from all further actions or proceedings including but not limited to any court action, appointment of receivers and managers and/or taking any action/proceeding whatsoever under any of the security documents signed with or given to the creditors against the applicant and any third party who have given security for and on behalf of the applicant until completion of the composite schemes of arrangement proposed herein, inter alia, pursuant to s 176(10) of the Companies Act 1965 except by leave of court and subject to such terms as this honourable court may impose; C D E
- (e) that pursuant to O 62 r 5 of the Rules of the High Court 1980, the applicant may serve a copy of the said restraining order on the plaintiff or plaintiffs to the action or proceedings more specifically set out in exh A-7 annexed to the affidavit herein and annexed to the originating summons and on the creditors of the applicant or any of them by way of ordinary post at their last known address and that upon such service, this order shall be deemed to have been duly served; and F
- (f) such other directions as this honourable court shall deem fit.

The orders were granted on 17 February 1993 and for prayer (b), the court had fixed the time as 10am creditors and 11 am for unsecured creditors, the date as 23 July 1993 and the place at the Hotel Regent, Kuala Lumpur. G

By summons-in-chambers filed upon a certificate of urgency on 3 March 1993, Bank of Commerce (M) Bhd had applied to intervene to set aside the orders obtained on 17 February 1993, to appoint two named persons from Price Waterhouse as interim receivers and managers pending the application, costs and other relief. This was followed by two other similar applications also filed upon certificates of urgency from Utama Wardley Bhd on 5 March 1993 except that there was no application for the appointment of interim receivers and managers, and from Rakyat Merchant Bankers Bhd on 12 March 1993 except that the two receivers and managers to be appointed were not as an interim measure pending the application. For this appeal, however, we are only concerned with the application by Bank of Commerce (M) Bhd (hereinafter 'the intervenor'). H I

- A According to learned counsel for the applicant when making his preliminary objection, they had filed an ex parte notice of motion and had been granted leave to obtain a committal order against the president and vice president of the intervenor for committing contempt of court by asking Barclays Bank PLC in Singapore to pay them US\$1m in consideration of the intervenor granting credit facilities to the applicant. As such, he insisted that the intervenor could not be heard until they had purged their contempt by returning the said amount to Barclays Bank PLC in Singapore.

- B Learned counsel for the intervenor had informed the court that they had not been served with the papers for the contempt proceedings and had argued that there was no basis for such as it had arisen from an ex parte order. In any event, they were denying the alleged contempt. Learned counsel for the applicant replied that they were in the process of serving the contempt proceeding papers and that a clear case of contempt had been made out before the court.

- C I had had occasion to deal with a similar application in another matter namely in the case of *Instituto Bancario San Paolo Di Torino Spa v Colour Touch Sdn Bhd & Anor*¹ which had been decided about three and a half months earlier. In the circumstances, I was of the opinion that I should decide similarly for this objection. It is certainly appropriate, therefore, for me to reproduce my finding in that earlier matter:

- D At the outset, learned counsel for the plaintiff had preliminarily objected to the fact, which I might add surprised learned counsel for the defendants somewhat, that the defendants had failed to comply with prayer 5 of the said order and that since they were in contempt of court, they should not be heard. She had referred me to pp 460 and 461 of Borrie and Lowe's *Law of Contempt* but on a cursory reading of the referred pages during the brief recess following the objection, I had discovered that the origin of the rule that a party in contempt cannot be heard or take proceedings in the same cause until he has purged his contempt applied only where a writ of attachment had been issued or where an order for committal had been made. At p 461 it is further stated, 'It is also established that the rule is inapplicable to an application to purge the contempt, or to the bringing of an appeal with a view to setting aside the order upon which the alleged contempt is founded. A party will also be heard to support a submission that upon the true construction of the order alleged to be disobeyed, his actions did not constitute a contempt, or that having regard to all the circumstances, he ought not to be treated as being in contempt. The reason that a party is allowed to be heard in these latter cases is that the object of the further application is to clear the very contempt complained of; on the other hand the rule does prima facie operate where the party in contempt seeks to invoke the aid of the court in the same cause upon some other issue than the issue of contempt itself'. In the event, I was more inclined to hold the view that the rule could not apply to set aside an injunction granted ex parte and accordingly overruled the preliminary objection.

- G I must add that *Hadkinson v Hadkinson*² need to be distinguished as there the wife had admitted the contempt complained of by the husband. There it had been held that 'it was the unqualified obligation of every person against, or in respect of whom, an order had been made by a court of competent jurisdiction, to obey it unless and until that order was discharged; that the mother in the present case had not brought herself within any of the

exceptions to the general rule which debarred a person in contempt from being heard by the courts whose order he had disobeyed; and that she being in continuing contempt by retaining the infant out of the jurisdiction her appeal could not be heard until she had taken the first and essential step towards purging her contempt by returning the child within the jurisdiction'. It was further decided that 'the fact that a party to a cause had disobeyed an order of the court was not of itself a bar to his being heard, but if his disobedience was such that, so long as it continued, it impeded the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it might make, then the court might in its discretion refuse to hear him until the impediment was removed. The present case was a good example of a case where the disobedience of the party impeded the course of justice'. Similarly, in *Avery v Andrews*,³ the court had found the defendants guilty of contempt. In the instant case, however, the contempt proceedings have yet to be heard.

In the final analysis, I was of the considered view that the intervenor should not be precluded from stating his stand despite the pending committal proceedings. I had, therefore, accordingly dismissed the applicant's preliminary objection.

Applicant's preliminary objection dismissed.

Reported by Wong Kim Fatt

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